FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 381.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Plaintiff in Error*,

vs.

THE UNITED STATES OF AMERICA, TO THE USE OF LEWIS E. SMOOT.

PETITION FOR REHEARING.

The plaintiff in error petitions for a rehearing, and, assigns as ground that the case stated in the opinion of this Court is materially different from the case made by the record.

The opinion opens with the statement that "This action was brought * * * against one Peyton D. Vinson as principal and plaintiff in error as surety on certain bonds"; it is further stated in the opinion that "recovery * * * was prayed against Vinson and the plaintiff in error", and "judgment entered as prayed for in the declaration", and the affirmance of the judgment against the surety, plaintiff in error, seems to be predicated upon the assumption of a subsisting judgment against the principal.

But in the case made by the record there is no judgment against the principal; he has not been made a party to this action, or sued.

The principal absconded before suit was brought, leaving the surety in ignorance of the principal's alleged indebtedness.

In its affidavit of defense, the surety set up its want of knowledge and upon that ground prayed for trial, but its prayer was overruled, and summary judgment entered against it without trial and without proof.

In the case stated in the opinion, the surety's liability is established by the record of the judgment against the principal, but in the case made by the record, the surety's liability is established only by the *ex parte* affidavit of its adversary.

Want of proof of its liability was the fundamental complaint of the surety in the case made by the record, but that proof is supplied in the case stated in the opinion by the record of the judgment against the principal.

The record of the judgment against the principal in the case stated in the opinion sweeps away all substantial ground for the main assignments of error in the case made by the record and reduces the rest to matters of form.

The difference between the case stated in the opinion and the case made by the record may have led this Court to treat as unimportant questions of form questions which if applied to the case made by the record might have been treated as most important questions of substance; for in the opinion it is said:

> "It would seem a logical result of the argument of plaintiff in error that there was a constitutional right to old forms of procedure, and yet it seems to be conceded that Congress has power to change them, even to the extent of enacting rule 73.
>
> "The concession of that power destroys the argument based on the Constitution, and *whether Congress exercised the power directly or delegated it to the Supreme Court of the District of Columbia can make no difference.*"

But as applied to the case made by the record, the fundamental complaint of the plaintiff in error was want of proof of its liability, not want of form.

The force and effect of the 73d rule as applied in the case made by the record go far beyond the force and effect of the rule as applied in the case stated in the opinion, and far beyond any question of form, for its effect as applied in the case made by the record, is to render unavailing the protection secured to a defendant by the 5th and 7th Amendments, and by Secs. 861 *et seq.*, R. S. U. S., to force him into *involuntary* default, and then to make such involuntary default justification for the entry of summary judgment against him upon the *ex parte* affidavit of his adversary, in cases when the defendant cannot deny, under the sanction of an oath, the facts upon which he is sought to be charged, because he has no knowledge of those facts.

The plaintiff in error prays the judgment of the Court whether the 73d rule as applied in the case made by the record is valid.

THE FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
Plaintiff in Error,
By L. H. POOLE,
Its Attorney of Record.

I hereby certify that, in my opinion, the foregoing petition for rehearing is well founded in fact and in law, and that, in my opinion, the main questions raised by the assignments of error as applied to the case made by the record are left undecided by the judgment of this Court, by reason of the difference between the case stated in the opinion of the Court and the case made by the record.

Respectfully
L. H. POOLE,
Counsel for the Plaintiff in Error.